A

JAFERI IPEE

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
ANANTHAM KASINATHER JCA
DAVID WONG DAK WAH J
[CRIMINAL APPEAL NO: Q-05-411-2010]

C

3 JANUARY 2013

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction and sentence - Appeal against - Identification of assailants who caused death of deceased - Turnbull Guidelines - Whether Turnbull Guidelines on*

D

identification followed - Identification parade - Whether in accordance with standard and acceptable practice - Whether computerised facial composition had resemblance to appellant - Whether there was doubt as to accuracy of identity of assailant - Whether conviction safe

E

The appellant was charged for the murder of the deceased under s. 302 of the Penal Code. The facts of the case as unfolded by the prosecution were that on the night of 21 July 2003, in a farmhouse belonging to the deceased's employer, the deceased and PW6 were woken up by two men who, after kicking at the door

F

until it was forced open, had attacked both PW6 and the deceased. The two men had dragged both PW6 and the deceased out to a jackfruit tree. PW6 overheard the bigger sized man ('the appellant') shouting to the smaller sized man to "bunuh saja suami dia". The smaller sized man had replied "sudah sudah". After

G

dragging the deceased and PW6 back into the house, the two men had doused the curtains with petrol. The appellant had then poured petrol over PW6, who had begged him not to kill her but the appellant said he had to as she would recognise his face. The appellant lit a lighter and the two men subsequently left the

H

house. PW6, however, managed to escape from the burning house. The trial judge held that the prosecution had sufficiently proved the identity of the accused as one of the assailants who had caused the death of the deceased and found the appellant guilty and convicted him of the offence. The appellant thus appealed against the said conviction and sentence. The central

I

issue that arose in this appeal was the identification of the appellant. It was submitted by the appellant that (i) that the

identification of the appellant did not follow the "*Turnbull* Guidelines"; (ii) there was doubt as to the identity of the appellant as the computerised facial composition ('exh. P8') bore no resemblance to the appellant.

Held (unanimously dismissing appeal; affirming conviction and sentence)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) The *Turnbull* Guidelines basically state the factual circumstances that justified an "acceptable" identification. It speaks of visibility and opportunity. At the particular house where the murder took place, there was a fluorescent tube lighting fixed to the ceiling above the door to the entrance of the house. PW6 did have a good opportunity and visibility for her evidence on identification of the appellant when she was attacked and dragged in and out of the house by the intruders. There was more than enough light for purposes of identification. (para 9)

(2) The evidence of the appellant telling PW6 that he had to kill her because she would recognise him and would lodge a police report against him, was by itself evidence that the appellant was aware that he could be recognised and identified. Further, the whole episode of kicking the door, the struggles, the dragging of PW6, the attempted rape, the pouring of petrol must have taken some time. The interactions between PW6 and the appellant were within close proximity to each other. This was thus not a case of a 'fleeting glance' within a very short span of time. PW6 had all the opportunity and with good visibility for her evidence on the identification of the appellant to be acceptable. (paras 9 & 10)

(3) The identification parade that was conducted by PW8 was in accordance with the standard and acceptable practice. PW6 had positively identified the appellant twice, at two separate identification parades. Even though PW6 was subjected to cross-examination on the identification parade, her evidence remained unshaken. Also, the identification parades took place about two weeks after PW6's ordeal at her house. It was held within a reasonable period when the memory of the identifier was still vivid and fresh. (paras 11 & 12)

(4) On the issue of the computerised facial composition (exh. P8), PW12 testified that P8 was used to assist in identifying the suspect. As a police officer, he does not take the image shown in a photo-fit as 100% accurate of the person they were looking for. When PW6 said that the completed image on the computer was 60% like the suspect, it must not be overlooked that what PW6 was referring to was a "composite" image or picture ie a picture assembled or pieced together from different images of a persons' eyes, nose and mouth shown to PW6. Although PW6 may not be able to remember or describe in detail the facial features of her assailant, it did not follow that if she saw her assailant in person she would not be able to recognise and identify him. (paras 13 & 15)

(5) The defences were just mere denials. When the defence case is merely an outright denial and nothing more, it is of no assistance to the accused person (*Public Prosecutor v. Ku Lip See*). From the evidence adduced at the trial, the testimony given by PW6 was unwavering and firm. This was not a case of mistaken identity. There was no real doubt about the accuracy of the identity of the appellant. Thus, the conviction was safe. (paras 19, 24 & 26)

Bahasa Malaysia *Translation of Headnote*

Perayu telah dituduh membunuh si mati di bawah s. 302 Kanun Keseksaan. Fakta kes yang dibentangkan oleh pihak pendakwaan adalah bahawa pada malam 21 Julai 2003, di dalam sebuah rumah ladang milik majikan si mati, si mati dan PW6 telah dikejutkan oleh dua orang lelaki yang, selepas menendang pintu sehingga ia terbuka, telah menyerang kedua-dua PW6 dan si mati. Kedua-dua lelaki tersebut telah mengheret kedua-dua PW6 dan si mati ke pokok nangka yang terdapat di luar rumah. PW6 telah mendengar lelaki yang bersaiz besar ('perayu') menjerit ke arah lelaki bersaiz kecil "bunuh saja suami dia". Lelaki yang bersaiz kecil menjawab "sudah sudah". Selepas itu, mereka mengheret si mati dan PW6 balik ke dalam rumah dan seterusnya telah menyimbah petrol ke atas langsir rumah itu. Perayu kemudiannya menyimbah petrol ke atas badan PW6, dan PW6 telah merayu kepada perayu agar tidak membunuhnya tetapi perayu berkata bahawa perayu terpaksa berbuat demikian kerana PW6 dapat mengenali muka perayu. Perayu telah menyalakan api dan kedua-dua lelaki itu telah meninggalkan rumah itu. Walau bagaimanapun, PW6 berjaya melarikan diri daripada rumah terbakar tersebut. Hakim bicara telah

memutuskan bahawa pihak pendakwaan telah berjaya membuktikan dengan secukupnya identiti tertuduh sebagai salah seorang daripada penyerang-penyerang yang telah menyebabkan kematian si mati dan mendapati perayu bersalah dan menyabitkannya atas kesalahan tersebut. Perayu oleh itu merayu terhadap sabitan dan hukuman tersebut. Isu utama yang timbul dalam rayuan ini adalah berkenaan pengecaman perayu. Perayu menghujahkan bahawa (i) pengecaman perayu tidak mengikut Garis Panduan *Turnbull*; (ii) terdapat keraguan mengenai identiti perayu kerana komposisi muka melalui komputer ('lampiran P8') tidak mempunyai persamaan dengan perayu.

Diputuskan (sebulat suara menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Mohamed Apandi Ali menyampaikan penghakiman mahkamah:

(1) Garis Panduan *Turnbull* pada dasarnya menyatakan keadaan fakta yang menjustifikasikan pengecaman tersebut "boleh diterima". Ia membincangkan tentang penglihatan dan peluang. Di rumah di mana pembunuhan itu telah berlaku, terdapat lampu tiub yang terang terpasang atas pintu masuk rumah tersebut. PW6 mempunyai peluang dan penglihatan yang bagus bagi keterangannya berhubung pengecaman perayu apabila dia telah diserang dan diheret ke luar rumah dan ke dalam rumah oleh penceroboh-penceroboh. Terdapat cahaya yang cukup terang bagi tujuan pengecaman.

(2) Keterangan perayu memberitahu PW6 bahawa perayu harus membunuhnya kerana PW6 akan dapat mengecam perayu dan akan membuat laporan polis terhadap perayu, adalah dengan sendirinya keterangan bahawa perayu sedar bahawa perayu boleh dicam dan dikenalpasti. Ditambah lagi, keseluruhan episod menendang pintu, pergelutan dan seretan PW6, percubaan merogol, mencurah petrol semestinya mengambil masa. Interaksi di antara PW6 dan perayu berada dalam jarak dekat di antara satu sama lain. Oleh itu, ini bukanlah kes 'sekilas pandang' dalam tempoh masa yang sangat singkat. PW6 mempunyai peluang dan penglihatan yang bagus bagi kebolehterimaan keterangan pengecaman perayu.

(3) Kawad cam yang telah dijalankan oleh PW8 adalah menurut amalan standard dan boleh diterima. PW6 telah secara positif mengenal pasti perayu sebanyak dua kali, dalam dua kawad cam yang berbeza. Walaupun PW6 tertakluk kepada

pemeriksaan balas mengenai kawad cam tersebut, keterangannya kekal teguh. Tambahan pula, kawad cam telah dijalankan dua minggu selepas PW6 mengalami pengalaman pahit itu di rumahnya. Ia dijalankan dalam tempoh yang munasabah apabila ingatan pengecam masih segar dan jelas.

(4) Mengenai isu komposisi muka melalui komputer ('lampiran P8'), PW12 memberi keterangan bahawa P8 digunakan untuk membantu dalam mengenal pasti suspek. Sebagai pegawai polis, PW12 tidak mengambil imej yang diberikan dalam *photo-fit* sebagai 100% tepat menyerupai orang yang mereka cari. Apabila PW6 mengatakan bahawa imej dalam komputer 60% menyerupai suspek, tidak boleh diketepikan bahawa PW6 sebenarnya merujuk kepada "komposit" imej atau gambar contohnya gambar yang dicantumkan atau disambungkan bersama daripada imej-imej mata, hidung dan mulut orang yang berbeza yang ditunjukkan kepada PW6. Walaupun PW6 tidak boleh mengingati atau memberikan butir-butir ciri-ciri wajah penyerangnya, ia tidak bermakna jika PW6 melihat penyerangnya dengan sendiri PW6 tidak dapat mengecam atau mengenal pastinya.

(5) Pembelaan-pembelaan yang dikemukakan hanyalah penafian semata-mata. Apabila kes pembelaan hanya sekadar penafian secara terang-terangan, ia tidak dapat membantu tertuduh (*Public Prosecutor v. Ku Lip See*). Berdasarkan keterangan yang dikemukakan semasa perbicaraan, keterangan yang dikemukakan oleh PW6 adalah teguh dan tidak goyah. Ini bukanlah kes kesilapan identiti. Tiada keraguan mengenai ketepatan identiti perayu. Oleh itu, sabitan adalah selamat.

Case(s) referred to:

Arumugam & 2 Ors v. PP [1994] 4 CLJ 519 HC ***(refd)***
Chan Sin v. PP [1949] 1 LNS 9 HC ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(foll)***
Ng Thian Soong v. PP [1990] 1 CLJ 1107; [1990] 1 CLJ (Rep) 202 SC ***(refd)***
PP v. Ku Lip See [1980] 1 LNS 166 HC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ACJ ***(refd)***
R v. Turnbull & Others [1976] 3 All ER 549 ***(foll)***
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC ***(refd)***
Yau Heng Fang v. PP [1985] 2 CLJ 22; [1985] CLJ (Rep) 350 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 402A
Penal Code, s. 302

For the appellant - Anthony Tai; M/s Anthony Tai & Advocs
For the respondent - Mahadhir Mohd Khairudin; DPP

[Appeal from High Court, Sabah & Sarawak; Criminal Trial No: 45-01-2004-I]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] The appellant was convicted for the offence of murder under s. 302 of the Penal Code and sentenced to death. The charge against the appellant reads as follows:

> That you, with another person (still at large), on 21st day of July, 2003, at about 11:30pm, at a Farmhouse Lot, 948, Sg. Moyan, Jalan Sg. Moyan, Baru Kawa, Kuching, in the State of Sarawak in furtherance of the common intention of you both, committed murder by causing the death of RUSLAN BIN RUSLI (M), 31 years old, and that you thereby committed an offence punishable under Section 302 of the Penal Code (Act 574) read with section 34 of the same code.

[2] The appellant's appeal is against conviction and sentence. This is the second time, the appellant appeared before the Court of Appeal. Earlier, he appeared as a respondent, when the Public Prosecutor appealed against his acquittal, of the end of the case for the prosecution. In that earlier appeal, the Court of Appeal allowed the Public Prosecutor's appeal and ordered that defence is to be called. After hearing the defence, the learned trial judge convicted the appellant. On appeal, this court dismissed his appeal and affirmed the conviction and sentence imposed by the High Court.

[3] From the grounds of judgment of the learned trial judge, who took pain to explain the reason for his earlier decision to discharge and acquit the appellant of the end of the prosecution's case and the subsequent reason in convicting the appellant, it is

clear that the central issue in this appeal is the identification of the appellant. The learned trial judge wrote: "The Court of Appeal allowed the appeal and directed that the accused be called to make his defence to the charge. So it must be taken that the prosecution had sufficiently proved the identity of the accused as one of the assailants who had caused the death of the deceased." In fact, during the hearing of this appeal the core issue submitted by the appellant was on the issue of identification.

[4] Before, we deal with the central issue of identification, it will be appropriate to summarise briefly the facts of the case.

Factual Matrix Of The Case

[5] The facts of the case as unfolded by the prosecution are as follows:

> Ruslan bin Rusli ('the deceased') and his wife Neti Kusrini Binti Mustapha (PW6) are from Indonesia. On 21.7.2003 they also lived on the farm in a farmhouse belonging to their employer. No one else lived in the farmhouse with them.
>
> On the night of 21.7.2003 PW6 and her husband had gone to bed when they were woken up at about 10.00 p.m. by noises coming from their front door.
>
> On peeping her husband saw two persons. Her husband then handed Neti (PW6) a parang while he armed himself with an iron rod.
>
> The two persons outside the house shouted for the door to be opened but when Neti (PW6) and the deceased refused to do so, the persons outside started kicking at the door until it was forced open. The persons then entered the house. According to Neti (PW6) one of them was big sized, about 5' 8" tall and held a knife while the other was a little skinny and about 5' 1" tall.
>
> Neti (PW6) testified that on the night in question no lights were switched on in the house but outside the house there was a florescent tube fixed to the ceiling above the door to the entrance of the house. When the two men entered the house, the deceased tried to hit the bigger sized man's hand which was holding the knife but he was pushed by the thinner sized man and fell down.
>
> Both intruders then began hitting the deceased. Neti (PW6) attacked the bigger sized man and hit him twice on his back with the parang but to no effect as she said he was wearing thick clothing. The parang then fell out of Neti's hand after which the deceased was dragged out of the house by the two men, leaving her alone in the house.

Later the bigger sized man came back and dragged Neti (PW6) out of the house as well. She and the deceased were dragged to a Jackfruit tree which was about 20 feet away from the main door of the house. A

The deceased's hands and feet were then bound while Neti's hands were tied. The bigger sized man then dragged Neti (PW6) back into the house where he placed a knife at her throat and repeatedly demanded to know where the money was kept but Neti (PW6) refused to tell. B

She also heard the deceased shouting out to her not to give any money. The bigger sized man then shouted to the smaller sized man outside the house to 'bunuh saja suami dia'. The smaller sized man then replied from outside the house 'sudah sudah'. C

The smaller sized man then came into the house and began ransacking it while Neti (PW6) was held by the bigger sized man. Neti (PW6) said that fearing for her life, she told them where the money was. After finding the money the smaller sized man left the house but came back, dragging the deceased into the house. D

In the meantime the bigger sized man had dragged Neti (PW6) to a bed in the room. The deceased was then placed on the bed next to Neti. She said her husband was motionless but when being put onto the bed his hands had lifted up, allowing her to see a stab wound on the left side of his waist. The smaller sized man then left the house. E

The bigger sized man then tried to rape Neti (PW6) but he was unsuccessful as he could not get an erection. On hearing the smaller sized man shout at him not to take so long, the bigger sized man dragged Neti (PW6) towards the main door where her hands and feet were bound by both men. F

According to Neti, she was then about 3 feet away from the main door. The two men then began to douse the curtains with petrol which was stored in the house – the petrol was used for operating the sprinkler system on the farm. G

The bigger sized man then poured petrol over Neti (PW6) while the smaller sized man poured petrol over the deceased's body which was on the bed. Neti (PW6) then begged the bigger sized man to spare her life. H

She kissed his feet and told him that she had children in Indonesia to support, but the bigger sized man said he had to kill her as she would recognize his face. I

A The two men then left the house. On their way out the bigger sized man lit a lighter and put it close to where the deceased was lying on the bed. The bed and the deceased caught fire. The bigger sized man then left the house closing the door behind him with Neti (PW6) left in the house with her hands and feet bound.

B Neti (PW6) managed to escape from the burning house by hopping away from it, even though her hands and feet were bound. She then hid in a nearby jungle until daylight when she raised the alarm and managed to contact her employer to inform him of what happened. On 22.7.2003 Neti's employer went to the C farmhouse together with his driver one Kheng Lee Anak Binya who later lodged a police report at Batu Kawa Police station on the matter. That police report is Batu Kawa Report No. 863/03 (exhibit P7).

The Central Issue On Identification

D

[6] On this central issue, learned counsel for the appellant argued that there is doubt as to the identity of the appellant as the computerised facial composition, as in exh. P8 has no resemblance of the appellant. It was also argued that the E identification of the appellant did not follow the "*Turnbull* Guidelines" on identification.

[7] On the evidence adduced at the trial, with respect, we could not agree with the above said contentions by learned counsel for the appellant.

F

[8] The so called "*Turnbull* Guidelines" are as set out by the English Court of Appeal in *R v. Turnbull & Others* [1976] 3 All ER 549 OR [1977] QBD 224, which reads as follows:

G First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them H as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of words.

I Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under

observation. At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or an indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

[9] The guidelines basically state the factual circumstances that would justify an "acceptable" identification. It speaks of visibility and opportunity. In this appeal, in order to visualise the circumstances as to whether the witness, PW6, Neti did have a good opportunity and visibility for her evidence on identification of the appellant to be credible, it is pertinent to refer to the following salient facts:

(i) At the particular house where the robbery and murder took place, there was a fluorescent tube lighting fixed to the ceiling above the door to the entrance of the house. That being the case, surely when the door to house was kicked by the intruders, the light from the said florescent lighting would have shone into the house.

(ii) PW6, Neti was dragged through the door to the entrance of the house, at least, twice by the person whom she had described as the bigger sized man. First she was dragged out of the house and placed under a jackfruit tree. Later PW6 was again dragged into the house, to a bed in a room, the house.

(iii) The place where PW6 was placed, under a jackfruit tree, in front of the house, was only 20 feet away from the main door of the house. Surely again, at a distance of 20 feet, the lights from the florescent tube lighting must have shone right up to the tree and beyond.

(iv) After failing in his attempt to rape PW6, the bigger sized man, once again dragged her to the main door, where both intruders tied her legs and hands. According to PW6, she was then about three feet away from the main door. Here again, it is very near to the florescent tube lighting, that was hanging above, at the ceiling. There was more than enough light for purposes of identification.

(v) What really transpired at the main door are as narrated by PW6, as follows:

> The bigger man then dragged me towards the main door and tried to tie my hands again. The thinner person then came and tied up my legs. I pleaded with the bigger man not to kill me as I have children in the kampong.
>
> The bigger man then poured petrol over me while the thinner man poured petrol over my husband's body that was still lying on the bed. Each of them had a can of petrol. They got the petrol from our house. It was used to operate the engine for the sprinkler system.
>
> I then prayed at the feet of the bigger man and kissed his feet begging him not to kill me but he said he had to kill me as I would recognize his face. He said he had to kill me otherwise tomorrow I would lodge a police report.
>
> While I was begging the bigger man for my life, this took place not far from the main door of the house. It was about 3 feet from the main door. The bigger man then punched me and kicked me while I was still tied.
>
> Then they left and while on the way out the bigger man lit a lighter and put it close to where my husband was lying on the bed. The bed and my husband caught fire. The bigger man then left the house and closed the main door behind him, leaving me inside the house.

(vi) The evidence of the bigger sized man telling PW6 that he has to kill her because she would recognize him and would lodge a police report against him, is by itself evidence that the bigger sized man was aware that he could be recognized and identified.

(vii) The evidence of the bed and the deceased being burned with a lighter, after pouring petrol on the bed and the deceased, would have created a bonfire, which in the circumstances, have lighted up the whole place. This circumstance would

have given rise to another opportunity to identify the bigger sized man as there would have been more than sufficient light. A

(viii) The bigger sized man was subsequently identified by PW6, to be the appellant.

(ix) There was no evidence or suggestion that the intruder was wearing any mask or covering their faces. B

(x) The whole episode, of kicking the door, the struggles, the dragging of PW6, the questions as to the whereabout of money in the house, the attempted rape, the pouring of petrol (that was obtained from some other part of the house) must have taken some time. The interactions between PW6 and the bigger sized man are within close proximity to each other. C

[10] From the above listed salient facts, this is not a case of a "fleeting glance" within a very short span of time. PW6 had all the opportunity and with good visibility for her evidence on the identification of the appellant to be acceptable. The circumstances in this case is a far cry from the poor visibility and opportunity as in the case of *Yau Heng Fang v. PP* [1985] 2 CLJ 22; [1985] CLJ (Rep) 350; [1985] 2 MLJ 335. D E

[11] In this appeal, it is also our judgment that the identification parade that was conducted by PW8, Insp Fauzan was in accordance with the standard and acceptable practice. From the identification parade report (exh. P10), it can be seen that there is no great disparity of the ages of the participants and that of the appellant. This is in line with the observation made by Willan CJ in *Chan Sin v. PP* [1949] 1 LNS 9; [1949] 15 MLJ 106. F

[12] We note that in this appeal, PW6 positively identified the appellant twice, at two separate identification parades. We also note that eventhough PW6 was subjected to severe cross-examination (from pp. 48 to 50 of the appeal records) on the identification parade, her evidence remained unshaken. It is also note worthy to state that the identification parades took place on 5 August 2003, about two weeks after PW6's ordeal at her house. It was held within a reasonable period when the memory of the identifier is still vivid and fresh. G H

I

[13] On the issue of the computerised facial composition (exh. P8), the salient facts are as follows:

(a) PW7, L/Cpl Kansan, who drew up P8, in his evidence said:

> The scope of my duty as a computerized facial composer is that when a witness or complainant comes to see me and gives me a description of a person regarding his eyes, nose, mouth, chin and hair I will try to find a match in the computer with the description given of the features I just described.
>
> The samples of the features I just described are already in the computer programme supplied by Police Headquarter in Bukit Aman, Kuala Lumpur.
>
> When the face of a person is composed on the computer using the description supplied and appears on the screen, the witness is asked by how many percent the picture on the computer is similar to the person being drawn.
>
> When the lady gave me the description and I had done the facial composition on the computer, the lady saw it and said it was 60% likeness to the person being described.
>
> The five descriptions the lady gave me were of the eyes, nose, mouth, chin and hair which became a face and she said it was 60% likeness.
>
> The way I composed the face on the computer was like this: I asked the lady to describe the eyes. In the computer there are many images of the eyes, I will then scroll through and ask the lady to indicate. When she said it was like the eyes of the person she was describing, I will select that particular image, then go on to the next facial feature which is the nose. I will go through the same process I described for each feature until the 5 features I described are completed when we will have a composite face on the computer. That is the face the lady will be asked to indicate how many percent it is like the person being described.

(b) PW12, the arresting officer who arrested the appellant, testified as to how he uses P8 in assisting him to identify the appellant, as follows:

> This photo-fit exhibit P8 assisted us in identifying the suspect when the police launched the operation to arrest the suspect.

> When we arrived at the house we used the pho-fit to help us to identify the suspect from amongst the people in the house.
>
> There were a number of people in the house. I cannot recall how many persons were there or how many men there were in the house.
>
> As a police officer who is experienced in CID work, I do not take the image shown in a photo-fit as 100% accurate of the person we are looking for. I regard a photo-fit as 60% accurate. I always look for some characteristics in the photo-fit which will help to identify the suspect.
>
> For example, in this case it was the eyes shown in the photo-fit which was the distinguishing feature. I also used the general outline of the face shown in the photo-fit.

[14] In cross-examination, PW12 maintained that exh. P8 had a 60% resemblance of the appellant.

[15] On this issue, the learned trial judge wrote:

> When Neti said that the completed image on the computer was 60% like the suspect, it must not be overlooked that what Neti was referring to was a "composite" image or picture i.e. a picture assembled or pieced together from different images of a persons eyes, nose and mouth shown to Neti. Since Neti was asked to compose a picture from pre-prepared image, it would be humanly impossible to compose a 100% likeness of the Accused. Likewise just because Neti may not be able to remember or describe in detail the facial features of her assailant so that a better than 60% likeness of him can be composed on the computer, it does not follow that if she saw her assailant in person again she would not be able to recognize him and identify him.

[16] We could not find any reason not to agree with the above analysis of the evidence in respect of exh. P8.

[17] Corollary to the issue on identification learned counsel for the appellant also submitted that the learned trial judge had failed to adequately consider the defence.

[18] From the appeal records, the defence consisted of three sentences only, which reads as follows:

> I did not cause of Ruslan bin Rusli on the 21st July 2003 at 11.30pm at the farm house Lot 948, Sungai Moyan Batu Kawa, Kuching.

A I was not there at the farm house at 11:30pm on 21st July 2003.

I was not involved in anyway in this case.

[19] The defences are just mere denials. The trial court was of such a view and so do we. It is trite law that when the defence
B case is merely an outright denial and nothing more, it is of no assistance to the accused person. See: *PP v. Ku Lip See* [1980] 1 LNS 166; [1981] 1 MLJ 258. No doubt, an accused person need not have prove anything, but "A mere denial without other proof to reasonably dislodge the prosecution's evidence is not
C sufficient," a quotation from *PP v. Ling Tee Huah* [1980] 1 LNS 212; [1982] 2 MLJ 326.

[20] On the evaluation of the defence, the learned Deputy Public Prosecutor submitted at length that the denial as to the
D appellant's presence at the scene of the crime is a defence of alibi which could not be accepted. On this submission, we must state, in *obiter*, that there is a distinction between bare denial evidence and evidence in support of an alibi. To recapitulate, what the appellant said in evidence was: "I was not there at the farm
E house at 11:30pm on 21 July 2003." He did not say where he was at that particular time and date. This, in our judgment, is just a bare denial evidence. See: *Vasan Singh v. PP* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 and *Ng Thian Soong v. PP* [1990] 1 CLJ 1107; [1990] 1 CLJ (Rep) 202; [1990] 2 MLJ 148.

F **[21]** In the absence of any evidence in support of an alibi, with due respect, to the learned Deputy Public Prosecutor the issue of any notice of alibi under s. 402A of the Criminal Procedure Code, is irrelevant.

G **Conclusion**

[22] Upon perusal of the appeal records and after hearing and reading the submissions by both parties, it is our judgment, that applying the *Turnbull* Guidelines to the facts of this case, there was
H no doubt that the appellant was correctly identified by PW6. Furthermore, the witness, PW6 subsequently identified the appellant at two identification parades, which were held about two weeks after the incident (as compared to ten months in the case of *Arumugam & 2 Ors v. PP* [1994] 4 CLJ 519).

I

[23] On the usage of the *Turnbull* guidelines, we are appreciative of the fact that there are merely guidelines and any findings pertaining to identification will depend on the facts of the case. See *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65.

[24] The acceptance of PW6's evidence as to the identification of the appellant, is a finding of fact based on the credibility of the witness. From the evidence adduced at the trial, we find that the testimony given by PW6 was unwavering and firm. This is not a case of a mistaken identity. From the facts of the case we find that there is no real doubt about the accuracy of the identity of the appellant, by PW6.

[25] Last but not least, in hearing this appeal, we are guided by what said in the case of *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389, which, *inter alia*, reads as follows:

> *… Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe …* (emphasis added)

[26] In this appeal, it is our judgment that the conviction is safe.

[27] On that note, we unanimously dismissed the appeal by the appellant; and affirmed the conviction and sentence by the High Court.